(1)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by "clear and convincing" evidence?

2. In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence--no matter how strong--shows the official's actual reason for the act was unconstitutional?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were Leonard Rollon Crawford-El, plaintiff-appellant, and Patricia Britton and the District of Columbia, defendants-appellees.

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Cases:

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, appear in the appendix ("App.") at 1a-95a and are reported at 93 F.3d 813. The district court's opinion dismissing petitioner's complaint, App. 115a-141a, is reported at 844 F. Supp. 795. The district court's opinion denying reconsideration, App. 110a-114a, is reported at 863 F. Supp. 6.

The opinion of the court of appeals on respondent's interlocutory appeal appears at App. 145a-160a. It is reported at 951 F. 2d 1314.

Other opinions and orders entered in the case are unreported.

JURISDICTION

The judgment of the court of appeals was entered August 27, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Crawford-El, a District of Columbia prisoner, filed a complaint in the district court under 42 U.S.C. § 1983 alleging, *inter alia*, that respondent Britton, a District of Columbia Department of Corrections official, retaliated against him for his exercise of First Amendment rights.[1] Petitioner's First Amendment retaliation claim against Britton, the only claim addressed by the *en banc* Court of Appeals, is the only claim at issue in this petition.[2]

Facts

The district court stated the First Amendment retaliation claim against Britton as follows:

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[1] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

[2] The appellate court's disposition of petitioner's First Amendment retaliation claim against the District of Columbia was entirely in petitioner's favor. App. 96a-99a. Petitioner does not seek review of the appellate panel's rejection of his other claims. App. 100a-106a.

> Crawford-El had a history in prison of speaking to the press about poor prison conditions and of filing lawsuits against Britton and other prison officials and the government. He had communicated with newspaper reporters, filed informal requests for redress of grievances, aided other prisoners who were seeking redress, made persistent requests for the return of his property, and pursued litigation against Britton and other Department of Corrections employees or the District of Columbia. (Fourth Amended Complaint, at ¶¶ 41(a), 48.) Britton, he alleges, intentionally withheld and diverted his property during the transfers in order to retaliate for this "legal troublemaking," violating his First Amendment rights to freedom of speech and to petition for redress of grievances. As a result, he claims to have been forced to incur the cost of replacing clothing and shipping his boxes to himself, and to have suffered emotional distress.

App. 126a. In support of this claim petitioner's verified complaint reported specific incidents in which respondent manifested her knowledge of petitioner's First Amendment activity, her hostility toward him on account of it, and her retaliatory intent. As the district court noted:

> (1) Crawford-El alleges that Britton treated him worse than other prisoners because she knew that when he had been in charge of the law library at the Central Facility, he had helped other prisoners prepare their Administrative Remedy Prodedure grievance forms or their appeals of disciplinary decisions. Crawford-El had "a reputation for asserting legal rights and knowing the administrative procedures for doing so," and that made Britton hostile towards him. (Fourth Amended Complaint, at ¶ 6.)
>
> (2) Crawford-El helped found an Inmate Grievance Committee to protest the lack of prisoner clothing and the

correctional staff's persistent inability [to] account for all prisoners in time for the prisoners' morning educational programs. Britton knew about Crawford-El's role in the Inmate Grievance Committee, and he alleges that it made her hostile towards him. When Crawford-El was typing in a correctional office as part of his clerical job, Britton caustically told the captain for whom he worked to make sure Crawford-El was not typing up lawsuits or grievance complaints. Britton then stood over him to see what he was typing. (Fourth Amended Complaint, at ¶¶ 7, 9.)

(3) On April 20, 1986, The Washington Post published a front-page article about jail overcrowding based on interviews with Crawford-El. The next day, Britton chastised Crawford-El for tricking her and for embarrassing her before her co-workers. She [attempted to place him in restrictive confinement,] threatened to make life hard for him in jail any way she could [for as long as he was incarcerated, and had him transferred to another facility]. (Fourth Amended Complaint, at ¶ 12.)

(4) Britton stated on another occasion [a December 1988 airplane trip transferring Crawford-El and others to Washington State] that prisoners like Crawford-El "don't have any rights." [She made this remark in response to complaints by Crawford-El and other prisoners on the airplane that an officer's videotaping of them handcuffed and chained violated their privacy.] (Fourth Amended Complaint, at ¶ 15.)

(5) After the publication of a second The Washington Post article, which reported inmates' suspicions that "they were handpicked for transfer [from the District of Columbia to the State of Washington] because they were 'jailhouse lawyers'--troublemaking 'writ-writers' who tied up the courts with occasionally successful lawsuits against

the prison system" and quoted Crawford-El to that effect ["What you have here are the civil litigants of Lorton who have been put here to get us out of their hair so our lawsuits will be dismissed on procedural grounds"], Britton told another prison official that Crawford-El was a "legal troublemaker." (Fourth Amended Complaint, at ¶¶ 16-17.)

App. 129a-130a (district court opinion) and App. 178a-180a (additional details stated in the Fourth Amended Complaint).

During the six months following the December 1988 transfer to Washington State, Crawford-El and several other prisoners submitted to the D.C. Mayor letters noting their intent to sue the District of Columbia over the videotaping that Britton had allowed during the transfer. App. 181a.

Soon thereafter, in July 1989, Britton told Washington State authorities to seize and send to her office in the District of Columbia all of the transferred prisoners' property, because the prisoners were to be moved again. App. 181a-182a. During the next several weeks, prison officials sent Crawford-El to various facilities, and then to the federal prison in Marianna, Florida. During this period Crawford-El wrote to Britton, and spoke with her in person and by telephone, repeatedly telling her that he needed the legal materials she had seized. App. 183a-185a. Britton, however, diverted Crawford-El's property outside prison channels to Crawford-El's brother in law, Jesse Carter, whom Crawford-El had not authorized to receive it. App. 184a-185a. She told Carter that Crawford-El "should be happy she did not throw it in the trash." App. 186a.

Because Britton had diverted Crawford-El's property outside prison channels, federal prison officials in Marianna initially refused to allow Crawford-El to receive it when he had his mother mail it to him at his own expense. App. 188a.

To receive his property, Crawford-El had to submit a grievance, which caused federal prison officials to become hostile toward him. *Id.* He finally received his property in February 1990, over six months after Britton had seized it. *Id.*

District Court Opinion

The district court held that

> [a] jury might reasonably infer from [the complaint's] allegations that Britton diverted and withheld Crawford-El's property out of an unconstitutional desire to retaliate against a "legal troublemaker."

App. 131a. The district court also held that

> [b]ecause Crawford-El claims actual, financial injury, traceable directly to Britton's allegedly unconstitutional act, he has satisfied the injury requirement for his First Amendment claim.

App. 127a. The district court nonetheless dismissed this claim. The court held the complaint failed to plead "direct" evidence of Britton's unconstitutional intent, as required by circuit precedent applicable at the time. App. 131a.

***En Banc* Appellate Opinions**

The *en banc* Court of Appeals unanimously discarded the circuit's previous direct evidence rule. App. 11a-12a, 44a, 58a, 72a, 78a. Five members of the court, however, decided that Crawford-El must prove Britton's unconstitutional intent by "clear and convincing" evidence, in order to overcome her qualified immunity. App. 3a (opinion of Williams, J., in which three other judges joined); App. 58a (opinion of Ginsburg, J.). These five judges maintained that the evidence recited in

Crawford-El's verified complaint was not clear and convincing and that Britton would be entitled to summary judgment unless Crawford-El presented additional evidence meeting that standard. App. 34a, 71a. Judge Williams's opinion said Crawford-El should be required to present this evidence without being allowed any discovery. App. 3a. Judge Ginsburg's opinion would allow discovery if petitioner showed a "reasonable chance" that discovery would produce clear and convincing evidence of unconstitutional intent. App. 58a-60a.

Judge Silberman urged a different test. He said that an official who *asserts* a legitimate justification for a challenged act should be entitled to qualified immunity if the asserted justification would have been a reasonable basis for the act, even if evidence--no matter how strong--shows the official's actual reason was unconstitutional. App. 46a-50a.

Five members of the court rejected both the "clear and convincing" evidence standard and Judge Silberman's approach. They said the qualified immunity doctrine does not alter a plaintiff's burden of proof on the merits and that the evidence recited in petitioner's complaint entitles him to trial. App. 93a-94a.

REASON FOR GRANTING THE WRIT

The *en banc* majority's broad and unprecedented rulings that qualified immunity alters the burden of proof in cases of retaliation for exercise of First Amendment rights--five judges requiring "clear and convincing" evidence of unconstitutional intent, one judge requiring proof that a defendant's asserted justification is unreasonable, though evidence shows it was not the actual motive--conflict with the decisions of ten circuits and are incompatible with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Chief Judge Edwards, joined by four other judges, noted the significance of the rulings rendered by their six opposing colleagues:

> Without any directive from Congress or mandate from the Supreme Court, my colleagues run roughshod over the Federal Rules of Civil Procedure and invent new evidentiary standards that would make it all but certain that an entire category of constitutional tort claims against government officials—whether or not meritorious—would *never* be able to survive a defendant's assertion of qualified immunity. This result is both unfathomable and astonishing.

App. 78a (emphasis in original). Chief Judge Edwards pointed out the conflict between the views of the six judges and "the law of every other court of appeals in the nation," App 80a:

> [I]f a "clear and convincing" evidence standard were truly necessary to vindicate defendants' . . . [qualified immunity], as some of my colleagues seem to believe, one wonders why no other circuit has seen fit to embrace such a rule. Indeed, although nearly every other federal appeals court in the nation has addressed the precise issue that we face

> today, *not one* has adopted a standard even approaching the positions offered by my colleagues who view this case differently.

App 87a-88a (emphasis in original) and n. 7 (collecting cases from ten circuits).

Chief Judge Edwards also demonstated the incompatibility of his colleagues' opposing views with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a qualified immunity case in which "the plaintiff alleged that the defendants had violated his First Amendment rights by dismissing him in retaliation for testifying before a congressional committee," App. 87a:

> A rule requiring plaintiffs to meet a higher evidentiary standard in qualified immunity cases has never been endorsed by the Supreme Court, and (contrary to the suggestion in Judge Williams's opinion) *Harlow* itself gives no indication that the Court contemplated such an onerous requirement. Indeed, Judge Williams's opinion completely ignores the fact that, although the Court in *Harlow* stated that "insubstantial suits against high public officials should not be allowed to proceed to trial," the decision relies on the "firm application of the Federal Rules of Civil Procedure" to achieve this objective. *Harlow*, 457 U.S. at 819-20 n.35 (internal quotations omitted). Thus, nothing in *Harlow* gives appellate courts free-reign to perform their own cost-benefit analysis or to select new evidentiary standards out of thin air.

Chief Judge Edwards showed how "firm application of the Federal Rules of Civil Procedure" is "more than adequate to dispose of unmeritorious claims" prior to trial "without appellate judges taking it upon themselves to invent new evidentiary standards designed to address particular categories of cases." App. 85a. He cited the district court's

power "to limit initial discovery to a brief interrogatory concerning the plaintiff's evidence relevant to immunity." App. 83a. This kind of initial discovery enables the defendant quickly to determine, before answering any discovery by the plaintiff, whether to seek summary judgment based on plaintiff's inability to prove unconstitutional intent. Under Rule 56, F. R. Civ. P., as Chief Judge Edwards also noted, a plaintiff responding to such a summary judgment motion must either present evidence of unconstitutional intent or "show a reasonable likelihood" that allowing discovery by the plaintiff "will uncover evidence" proving that element of the claim. App 84a. The district court's power to limit all discovery to "the needs of the case," in order to avoid undue "burden or expense," also cited by Chief Judge Edwards, App. 83a and n.5 (quoting Rule 26(b)(2)(iii), F. R. Civ. P.), can ensure that any discovery allowed under Rule 56(f) is tailored to the reasonable likelihood the plaintiff has shown. Chief Judge Edwards wrote:

> These procedures are part of the standard apparatus provided by the Federal Rules to enable trial judges in civil suits to differentiate meritorious claims from frivolous ones, and the Supreme Court has *never* suggested that this same apparatus is somehow inadequate when it comes to the particular immunity concerns expressed in *Harlow*.

App. 85a. Chief Judge Edwards noted, moreover, that developments in summary judgment law since *Harlow* have eliminated earlier difficulties in obtaining summary judgment on the issue of subjective intent:

> [A]s Justice Kennedy has pointed out, the objective standard for qualified immunity articulated in *Harlow* was based on the fact that the standards for summary judgment at the time "made it difficult for a defendant to secure summary judgment regarding a factual question such as

> subjective intent." *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Now, however, "subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

App. 85a.

Judge Williams argued that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), supported his view that clear and convincing evidence of unconstitutional intent should be required in this case, but Chief Judge Edward pointed out the error in this reasoning:

> [M]y colleagues' attempt to justify a clear and convincing evidence standard by reference to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is in vain. In that case, nothing less than the First Amendment's guarantee of freedom of the press was at stake, and the Court concluded that this vital interest, enshrined in the Bill of Rights, justified a heightened evidentiary burden. *See, e.g., id.*, at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...."). Given that there is no analogous *constitutional right* protecting public officials from lawsuits, this case cannot possibly qualify as a "cognate" area of law.

App. 91a-92a.

Chief Judge Edwards's conclusion succinctly shows why review by this Court is warranted:

> Given the lack of any Supreme Court decision indicating that a "clear and convincing" standard can or should be invented by judges and overlaid onto the Federal Rules of Civil Procedure, the result proposed by the judges who view this case differently suggests an extraordinary use of judicial authority. One would have thought that the outcome they propose would be anathema to judges who advocate a philosophy of judicial restraint, particularly when the more prudent course is to insist on a firm application of the Federal Rules until such a time as the Supreme Court commands us to do otherwise, or an amendment is made either to the Federal Rules or to section 1983 itself.
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> [A]s Justice Kennedy recently pointed out, courts must be cautious about "devising limitations to a remedial statute, enacted by Congress, which "on its face does not provide for *any* immunities.' " *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). I therefore find it incredible that some members of this court seek to create new rules that would effectively render impossible all ... civil rights actions [against government officials] that turn on the[ir] intent.... Until the Supreme Court finally resolves the question once and for all, it appears that this circuit might sit alone among all the federal courts of appeal in its approach to this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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